

Supreme Court, U. S.

FILED

JUL 12 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. **76-36**

YAMAHA INTERNATIONAL CORPORATION,
Petitioner,

v.

HAROLD G. WHITEIS,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Yamaha International Corporation prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on March 9, 1976.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, dated March 9, 1976, is not yet officially reported, but is printed as Appendix A hereto.

The decision of the trial court, rendered orally from the bench by the United States District Court for the Northern District of Oklahoma, is not officially reported but is printed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 9, 1976. Petitioner filed a timely petition for rehearing in the Tenth Circuit, and the petition was denied on April 12, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Under a state statute granting a franchised motor vehicle dealer a cause of action against the franchisor for cancellation of the franchise agreement without "good faith," must the conduct of the franchisor be viewed in the context of coercion or intimidation or threats thereof pursuant to the statutory definition of "good faith" and the rule prevailing in decisions of the federal Courts of Appeals construing the Federal Automobile Dealers' Day in Court Act after which the state statute is patterned?

2. Can a motor vehicle dealer who is not operating dealerships at the franchised locations and who, in violation of his franchise agreements, attempts to operate the dealerships at unfranchised locations compel continuation of the franchise "indefinitely" and, in the event the franchisor does terminate the franchise agreements pertaining to the non-operating locations, recover damages for wrongful termination, as indicated by the decision of the Court of Appeals?

STATUTORY PROVISIONS INVOLVED

Section 565(j)(4) of title 47 of the Oklahoma Statutes Annotated provides a motor vehicle dealer with a cause of action for damages against the franchisor for "cancellation or failure to renew the fran-

chise agreement" between the parties "without good faith, as defined herein," and states further that

[a]s used herein, "good faith" means the duty of each party to any franchise agreement to act in a fair and equitable manner toward each other, with freedom from coercion or intimidation or threats thereof from each other.

Section 1221(e) of the Federal Automobile Dealers' Day in Court Act, 15 U.S.C. 1221 *et seq.*, provides:

The term "good faith" shall mean the duty of each party to any franchise * * * to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party * * *.

STATEMENT OF THE CASE

This action was originally instituted on June 28, 1972 by respondent Harold G. Whiteis ("Whiteis"), against petitioner Yamaha International Corporation ("Yamaha") in an Oklahoma state court to recover damages allegedly suffered by Whiteis as a consequence of Yamaha's cancellation of three written franchise agreements under which Whiteis had been authorized to sell Yamaha motorcycles in the Tulsa, Oklahoma area. Upon motion of Yamaha, the action was removed to the United States District Court for the Northern District of Oklahoma pursuant to 28 U.S.C. § 1441 as an action cognizable in the federal courts on the basis of diversity. There, the case was tried to the court without a jury, and judgment was entered for Whiteis on November 13, 1972. On appeal, the judgment was affirmed by the Tenth Circuit Court of Appeals on March 23, 1976.

At trial, Whiteis had alleged that the cancellations by Yamaha constituted violations of an Oklahoma statute¹ which gives a franchised motor vehicle dealer a cause of action for damages against the franchising manufacturer or distributor for the cancellation or failure to renew a franchise agreement without "good faith" as defined in the statute. The terminations on which Whiteis' cause of action was based had occurred in the fall of 1971, and involved the cancellation by Yamaha of written franchise agreements which pertained to three specific dealership locations in the Tulsa area. Each of the three agreements contained various provisions designed to govern the relationship between the parties. For Yamaha, which like many other manufacturers and national distributors of consumer products depends upon franchised dealers for the retailing of its products, the agreements were intended to insure that the retailing of Yamaha products would be carried out in a manner and from locations of sufficient quality to adequately represent Yamaha's good name and financial interests. For example, each of the agreements applied to a separate dealership location and provided that the dealer shall promote the sale of Yamaha products "aggressively" and shall do so only from "an address approved in writing by Yamaha"; that the dealer shall maintain an adequately staffed, trained and equipped service department and keep in stock a full line of Yamaha products; and that the dealer shall comply in good faith with all federal, state and local ordinances. Each agreement also specifically provided that the dealer was not thereby assigned an exclusive franchise for Yamaha products.

¹ 47 Okla. Stat. Ann. § 565(j)(4).

As the Court of Appeals acknowledged in its decision, at the time of the terminations none of the three franchised dealership locations was actually being operated as a business by the dealer, Whiteis. (App. 5, 6.)² One dealership, Tulsa Cycle Sports, had not been operated for over a year, having been initially closed by Whiteis during construction which had closed the street on which the dealership was located, while another dealership, Pappy's Cycle Center, had not been actively operated since 1967. Finally, the building which had housed the Yamaha of Tulsa dealership had been vacated by Whiteis and torn down prior to the cancellation of the franchise agreement pertaining to that location. When Whiteis attempted to move two of the inoperative dealerships, Yamaha of Tulsa and Pappy's Cycle Center, to premises not covered by the franchise contracts and not considered suitable to adequately represent the trade name of Yamaha, Yamaha refused to permit the sale of its products from such locations, and thereafter cancelled the franchise agreements pertaining to all three of the inoperative dealership locations.

In considering whether Yamaha had violated the Oklahoma statute by cancelling the three franchise agreements, neither the trial court nor the Tenth Circuit analyzed Yamaha's conduct in the context of "coercion or intimidation or threats thereof," in spite of the fact that the Oklahoma statute defines "good faith" in those terms and gives a dealer a cause of action for a franchise cancellation only where it is made "without good faith, as defined herein." Moreover, the court considered insignificant the fact that all three dealerships were inoperative at the time of the con-

² "App." refers to the appendices to this Petition.

tract cancellations. In the court's view, the significant fact was that "Whiteis had the intention and the ability to reopen them." (App. 7.) Had it not been for Yamaha's action, the Tenth Circuit stated, "the franchise agreements could have continued in effect indefinitely." (App. 9.)

REASONS FOR GRANTING THE WRIT

Yamaha submits that the decision of the Tenth Circuit Court of Appeals for which it seeks review by this Court places franchising manufacturers and national sales organizations such as Yamaha at the mercy of their locally franchised dealers. If the rationale of the decision is perpetuated, it would serve to totally disrupt the efficient distribution of products from the national level to the ultimate consumer and would effectively deny franchisors vitally interested in the quality of the representation of their products at the retail level the authority to insure such representation. For the reasons discussed below Yamaha submits that the decision of the Tenth Circuit Court of Appeals warrants review by this Court on a writ of certiorari.

I. The Decision of the Tenth Circuit Conflicts with Other Court of Appeals Decisions Which Hold that "Good Faith" Must Be Viewed in the Context of Coercion or Intimidation or Threats Thereof.

In its opinion, the Tenth Circuit specifically observed that the Federal Automobile Dealers' Day in Court Act,³ like the Oklahoma statute, was enacted to protect franchised motor vehicle dealers by giving them a cause of action for cancellation or non-renewal of a franchise agreement by the franchisor without "good faith." The definition of "good faith" in the Oklahoma stat-

³ 15 U.S.C. § 1221 *et seq.*

ute was taken almost verbatim from the definition of that term contained in the federal statute, as a comparison of the language of the respective definitions quoted above makes apparent. However, despite its apparent recognition that the state statutory standard follows that contained in the federal legislation, the Tenth Circuit proceeded to render a decision which Yamaha submits irreconcilably conflicts with other Court of Appeals decisions on the matter of what constitutes "good faith."

It least four federal Courts of Appeals, focusing on the statutory definition of "good faith" in the Automobile Dealers' Day in Court Act, have held that the existence or non-existence of good faith must be determined in the context of actual or threatened coercion or intimidation rather than in the context of the more broad and ordinary sense of the term.⁴ Thus, the Third Circuit has specifically rejected the suggestion of a dealer "that we construe the term liberally, not confining it to acts of coercion or intimidation."⁵ In another decision,⁶ the same court stated:

An indispensable element of the statutory cause of action is not the lack of good faith in the ordinary

⁴ *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964); *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 374 U.S. 896 (1963); *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962); *Woodward v. General Motors Corp.*, 298 F.2d 121 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962).

⁵ *Milos v. Ford Motor Co.*, *supra*, at 715. The dealer had maintained that conduct dealing with reasonableness, fairness, justice and equity in and of themselves (without coercion) could be considered on the issue of "good faith."

⁶ *Globe Motors, Inc. v. Studebaker-Packard Corp.*, *supra*.

sense but a lack of good faith in which 'coercion, intimidation or threats' thereof are at least implicit.⁷

The Second,⁸ Fifth⁹ and Eighth¹⁰ Circuits have also clearly adopted the approach that "good faith" must be viewed in this heightened "good faith" context.

In the instant case, the Tenth Circuit Court of Appeals, in conflict with other Court of Appeals decisions interpreting the term "good faith," did not view Yamaha's conduct in the context of "coercion or intimidation or threats thereof." That Yamaha was not given the benefit of the rule prevailing in other Circuits is made apparent both by the absence of any reference to this standard in the court's opinion and by virtue of the fact that if Yamaha's conduct had been viewed in the appropriate heightened "good faith" context, the contract cancellations could not have been considered wrongful. The statute under which Yamaha was held liable specifically applies to cancellations or failures to renew "the franchise agreement"; the only such agreements between Yamaha and Whiteis were incorporated into written contracts which specifically applied only to particular locations. Whiteis had ceased to operate dealerships at any of the three authorized locations, and, through no fault of Yamaha, had totally abandoned two of those locations. Cases construing the federal statute make clear that a franchisor is not prohibited by the "good faith"

⁷ *Id.* at 646.

⁸ *Pierce Ford Sales, Inc. v. Ford Co., supra.*

⁹ *Woodward v. General Motors Corp., supra.*

¹⁰ *Kotula v. Ford Motor Co., supra.*

requirement from terminating an inefficient dealer.¹¹ *A fortiori*, Yamaha's cancellation of the agreements pertaining to the three non-operative locations could not constitute bad faith in the sense of coercion or intimidation.

It is of great significance to all franchising manufacturers and distributors—as well as to the consuming public they serve—that the federal courts apply a uniform rule on the question of what constitutes "good faith" in the context of Dealers' Day in Court legislation. In light of the comparability of the state and federal statutory definitions of "good faith," the Tenth Circuit's failure to apply the rule articulated in other Court of Appeals decisions can only be viewed as in conflict with those decisions.¹² Accordingly, Yamaha respectfully requests that a writ of certiorari be granted and that review of the lower court decision be granted to establish that, contrary to the view of Tenth Circuit here, "good faith" must be viewed in the context of coercion, intimidation or threats thereof.

¹¹ *E.g., Milos v. Ford Motor Co., supra; Kotula v. Ford Motor Co., supra.*

¹² To the extent the Tenth Circuit decision can be viewed as not applicable to a federal rule on "good faith" but as establishing standards of good faith under Oklahoma law which are more lenient than under the federal statute, Yamaha submits that the writ should nevertheless issue. By so closely patterning its statute after the federal statute, Oklahoma has made evident that it wishes to adopt the prevailing federal view that "good faith" be viewed in the heightened context of coercion and intimidation. Therefore, by not applying the heightened good faith test the decision of the Tenth Circuit is in conflict with the applicable law of the state of Oklahoma, establishing an appropriate basis for a writ of certiorari. See Rule 19(1)(b) of the Rules of the Supreme Court of the United States.

II. The Tenth Circuit, by Effectively Holding that a Franchisor Has No Right To Control the Location from Which a Dealer Operates His Business, Has Placed Itself in Conflict with Other Circuit Court Decisions and with the Intent of the Legislation and Has Unconstitutionally Impaired Yamaha's Right to Contract.

As stated above, the Court of Appeals considered inconsequential the fact that none of the three dealerships terminated by Yamaha were operating at the time of the franchise cancellations. Nor did the court give credence to Yamaha's view that the unfranchised locations from which Whiteis purportedly intended to reinstitute operation of two of the dealerships were unsuitable for the selling and servicing of Yamaha products. The court instead emphasized that "Whiteis had the intention and the ability to reopen [the non-operating dealerships]." (App. 7.) In so doing, the court ignored the express language of the franchise agreements which obligated Whiteis to use his best efforts to promote the sales of Yamaha products and to do so only from locations approved in writing by Yamaha. In effect, the court held that the franchisor, having once issued a franchise for a location, was obligated to issue a new franchise for any other location from which the dealer subsequently chose to operate.¹³

¹³ This is clearly illustrated with regard to the Yamaha of Tulsa dealership. Section 565(j)(4) of the Oklahoma statute provides a cause of action for wrongful "cancellation or failure to renew the franchise agreement." (Emphasis added.) Since the franchise agreement between Yamaha and Whiteis explicitly pertained only to specific authorized locations and since Whiteis had totally abandoned the franchised Yamaha of Tulsa location for reasons unrelated to Yamaha, neither Yamaha's cancellation nor even its failure to renew that franchise agreement could have been wrongful, since continuation of a franchise agreement with respect to an abandoned location would have served no

Moreover, notwithstanding the fact that the dealerships had been inoperative and that the unfranchised locations to which Whiteis attempted to move were not considered suitable by Yamaha, the court stated "had it not been for Yamaha's action, the franchise agreements could have continued in effect *indefinitely*." (Emphasis added) (App. 9.)

Yamaha submits that the decision of the Tenth Circuit clearly goes beyond the bounds delineated by other federal Circuit Courts and, indeed, beyond the bounds of constitutionality. Numerous Circuit Courts have recognized in the context of the federal statute that a franchising manufacturer has a right to maintain sufficient control over its franchised dealers to insure adequate representation at the retail level and that the manufacturer is under no obligation to preserve an inefficient dealership.¹⁴ For example, in *Woodward v. General Motors Corp.*,¹⁵ on facts similar to those present here, where the dealership was moved from one site to another without the manufacturer's approval as required by the franchise contract, the cancellation of the agreement by the manufacturer for failure of the dealer to obtain a suitable location within a reasonable period of time was held not to constitute a lack of good faith on the part of the manufacturer. Under the approach taken by the Tenth

purpose for either party. Therefore, Yamaha's "violation" apparently was its refusal to grant an entirely new franchise agreement covering an unauthorized location unilaterally selected by the dealer and considered unsuitable by Yamaha.

¹⁴ E.g., *Kotula v. Ford Motor Co.*, *supra*; *Milos v. Ford Motor Co.*, *supra*; *Pierce Ford Sales Co., Inc. v. Ford Motor Co.*, *supra*.

¹⁵ 298 F.2d 121 (5th Cir.), *cert. denied*, 396 U.S. 887 (1962).

Circuit, a contract provision requiring a dealer to operate only from an authorized location is apparently void, and the franchising manufacturer or distributor is denied the right to determine the respectability and suitability of the surroundings in which its products are to be sold. The decision would apparently permit the goodwill associated with the franchisor's trade name to be destroyed by any irresponsible dealer more interested in selling from a low-overhead location than in maintaining the franchisor's image. The rationale of the decision cannot coexist with other decisions acknowledging the validity of a contract requiring operation only from authorized locations and recognizing the right of a franchisor to eliminate an inefficient, undesirable dealer.

Indeed, if the Oklahoma statute were in fact as broad as applied by the Tenth Circuit in the instant case, the statute would be unconstitutional as violative of the franchisor's freedom of contract rights. While the right to contract is not absolute and must yield to a reasonable exercise of the police power,¹⁶ Yamaha submits that any statute limiting a franchisor's ability to contract to the extent indicated by the Tenth Circuit in this case could not be considered reasonable. In a decision¹⁷ upholding the constitutionality of the federal Dealers' Day in Court Act which, as mentioned above,

¹⁶ *E.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, (1936):

"Deprivation of liberty to contract is forbidden by the Constitution if without due process of law; but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process."

¹⁷ *Blenke Brothers Co., Inc. v. Ford Motor Co.*, 203 F. Supp. 670 (N.D. Ind. 1962).

preserves the manufacturer's right to require by contract that the dealer operate only from authorized locations, the court emphasized that "in considering the purposes of the act and the means to accomplish those purposes"¹⁸ the extent to which contract rights had been restricted was not unreasonable. By contrast, the Tenth Circuit's application of the statute involved in this case is antithetical to the purposes of Dealers' Day in court legislation.

The purpose of the federal Dealers' Day in Court Act was to "balance the power now heavily weighed in favor of the automobile manufacturers" and to supplement the antitrust laws of the United States.¹⁹ Similarly, the Oklahoma statute states that one of its purposes is "to foster and keep alive vigorous and healthy competition by prohibiting unfair practices by which fair and honest competition is destroyed or prevented, and to protect the public against the creation or perpetuation of monopolies and practices detrimental to the public welfare * * *."²⁰ Yamaha submits that the effect of the Tenth Circuit decision is to swing the balance of power entirely into the hands of the dealers. Under the rationale of that opinion, it is the dealer who is enabled to engage in anti-competitive and monopolistic practices. Because a dealer who has at one time been granted a franchise can apparently operate his dealership in any manner he sees fit and from any location he chooses, whether or not considered suitable by the manufacturer, the quality and

¹⁸ *Id.* at 672.

¹⁹ H.R. Rep. No. 2850, 84th Cong., 2d Sess., 3 U.S. Code Cong. Adm. News 4596 (1956).

²⁰ 47 Okla. Stat. Ann. § 561.

efficiency of representation at the retail level will necessarily degenerate. Review of this case is necessary to insure that franchisors have the right to protect their interests and their good trade names and, correspondingly, that the consuming public will not be denied quality retailing.

CONCLUSION

The decision of the Tenth Circuit Court of Appeals, by failing to view Yamaha's conduct on the issue of "good faith" in the context of coercion, intimidation or threats thereof conflicts irreconcilably with other Court of Appeals decisions construing that term. By considering insignificant the provision of the contracts requiring the dealer to operate only from an authorized location and by permitting the dealer to recover damages for the cancellation of franchise agreements which pertained to locations which the court itself acknowledged were not being operated by the dealer, the Tenth Circuit has effectively turned the public policy objective of Dealer's Day in Court legislation on its head.

For the reasons discussed herein, the Petition for Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1036

HAROLD G. WHITEIS, a sole proprietor, d/b/a MOTOR
SPORTS OF TULSA, *Plaintiff-Appellee*,

v.

YAMAHA INTERNATIONAL CORPORATION,
a corporation, *Defendant-Appellant*.

No. 75-1037

HAROLD G. WHITEIS, a sole proprietor, d/b/a MOTOR
SPORTS OF TULSA, *Cross-Appellant*,

v.

YAMAHA INTERNATIONAL CORPORATION,
a corporation, *Cross-Appellee*.

Appeal from the United States District Court for the
Northern District of Oklahoma

[March 9, 1976]

Before HILL, SETH and DOYLE, *United States*
Circuit Judges

HILL, *Circuit Judge*.

This action was commenced by appellee, Harold G. Whiteis, to recover damages resulting from the cancellation of his franchises to sell Yamaha motorcycles. After a trial to the court, judgment was entered against appellant, Yamaha International Corporation, in the amount of \$100,000. The trial court found Yamaha acted in bad faith in violation of its obligations under the franchise contracts and under Okla. Stat. Ann. tit. 47 § 561 *et seq.*

(Supp. 1975-76).¹ Yamaha has appealed the judgment against it and Whiteis has cross-appealed from the denial of attorney's fees and punitive damages. We affirm on all issues except attorney's fees.

In 1962 Whiteis was granted an exclusive franchise to sell Yamaha motorcycles in Tulsa County, Oklahoma. The franchise agreement was oral and was the only agreement between the parties until 1964. There is evidence that in 1964 Yamaha changed its policy of granting exclusive territorial franchises to a policy of granting only dealership site franchises. Early that year Yamaha mailed Whiteis a written franchise agreement. Because the proposed agreement said nothing about his exclusive franchise area, Whiteis refused to sign. Some weeks later, at a national sales conference, Whiteis met with Yamaha's regional and national sales managers. The national sales manager told Whiteis the only purpose of the written agreement was to satisfy the requirements of Oklahoma law for the authorization of motor vehicle dealers and in no way affected their prior oral agreement for an exclusive franchise. The confrontation was repeated in 1965 when Whiteis again refused to sign a written franchise

¹ Section 565(j)(4) provides that a manufacturer's or distributor's license may be revoked if it "has cancelled or failed to renew the franchise agreement of any motor vehicle dealer . . . unfairly and without just provocation or without due regard to the equities of the dealer or without good faith, as defined herein." The section further provides that upon such cancellation, the party cancelling "shall compensate the dealer for his damages including attorney's fees"

Section 569 provides that it shall be a violation of the act and against the public interest for a manufacturer or distributor of motor vehicles "in terminating, cancelling or failing to renew a franchise, to fail to act in good faith and in a fair, equitable and non-discriminatory manner." This section also provides that the burden of proving good faith shall be on the manufacturer.

Section 576 provides the venue in damages actions under the act.

agreement without further assurance he still had the exclusive franchise. This time a new national sales manager made the same representation to Whiteis.

In subsequent years Whiteis signed written agreements without question. By 1969, the date of the last written agreements, there were written franchise agreements in effect for four separate dealership locations. Each stated that no exclusive territory was assigned to Whiteis, and each stated it superseded all prior agreements and was the only agreement between the parties. The agreements provided for cancellation by either party without cause upon giving 30 days written notice.

During the period from 1963 through 1970 Whiteis' business grew and prospered in varying degrees. He won several awards and sales contest trips for outstanding performance as a dealer. His operation peaked in 1970 with gross sales exceeding \$400,000 and net profits over \$45,000.

In 1971 Yamaha undertook a deliberate campaign to get rid of Whiteis as a dealer. This effort was allegedly prompted by a letter of complaint against Whiteis received by Yamaha from 18 former Whiteis customers. The trial court found there was "no evidence, whatsoever, that it was a genuine, authentic letter of complaint." There was evidence indicating it was phony. Yamaha did not investigate the supposed complaint, but directed its district sales manager, Larry Murphy, to document any and all possible reasons to terminate Whiteis. Murphy compiled his reasons and sent them to Yamaha with requests for cancellations. Yamaha then cancelled the franchises for three of Whiteis' four dealership locations. The trial court found the reasons submitted by Murphy were not the true reasons he requested the cancellations; he requested them because he was directed to do so by Yamaha's national sales manager. Murphy testified he did not know why Yamaha wanted to get rid of Whiteis unless it was because he had an exclusive franchise. At about this time Yamaha did

franchise another dealer in Tulsa. This dealer received extensive financial support for racing, an important means of motorcycle advertising, and was able to get popular models for sale which were unavailable to Whiteis.

At trial Whiteis relied heavily on a breach of the oral agreement for an exclusive franchise as a basis for recovery. Much of Yamaha's argument on appeal is directed to the oral agreement. Yamaha argues it is either unenforceable because of the statute of frauds or is superseded and extinguished by the subsequent written agreements which provided for termination at any time without cause. These arguments, however, do not go to the legal basis of the trial court's judgment. The trial court held the oral agreement was not within the statute of frauds, but held it made no difference to the outcome of the case whether or not it was abrogated by the written agreements. Even under the theory most favorable to Yamaha, there were valid written contracts granting the franchises. The judgment was based on the wrongful cancellation of these franchises, not on a breach of the exclusive franchise agreement. Therefore, we need not discuss the issues relating to the validity of the oral contract for an exclusive franchise.

The trial court found Yamaha violated the good faith obligation implied in the contracts and the good faith requirements specifically imposed on motor vehicle manufacturers and distributors by Okla. Stat. Ann. tit. 47, § 561 *et seq.* (Supp. 1975-76), in cancelling, terminating or failing to renew a franchise. We are doubtful whether the trial court's judgment could be sustained on contractual good faith grounds, but are convinced it may be upheld on statutory grounds. It has been the general rule that courts would not inquire into the reasons for termination when the contract reserved the power to terminate without cause, and Oklahoma courts have apparently followed this rule. *Ford Motorcar Co. v. Rackley*, 166 P. 427 (Okla. 1917).

See also Ritter v. Perma-Stone Co., 325 P.2d 442 (Okla. 1958); *Adalex Laboratories v. Krawitz*, 270 P.2d 346 (Okla. 1954).

The shortcomings of the general rule were felt most keenly in cases involving arbitrary termination of dealer's franchises. Through a manufacturer's caprice, a dealer could be denied the opportunity to reap the profits from a substantial initial investment.² Because of the difficulties in applying the concept of contractual good faith to contracts terminable without cause, statutes have been enacted to protect motor vehicle dealers.³ One such enactment is Okla. Stat. Ann. tit. 47, § 561 *et seq.* The Oklahoma statutes impose a duty of good faith on manufacturers and distributors in cancelling, terminating or failing to renew a franchise and provide that the dealer shall be compensated for any damages sustained from a wrongful termination. The evidence of bad faith is abundant in this case, and the Oklahoma Statutes entitle Whiteis to recover damages from Yamaha.

Yamaha contends the evidence failed to establish a basis for the award of damages. In support of its contention Yamaha points out that of the three dealerships for which the franchises were cancelled, none was an operative business at the time. While this may be technically true, it does not reflect the substance of Whiteis' dealings with Yamaha or the true status of his business before the cancellations.

² For a discussion of the problem and judicial efforts to fashion a remedy for injured dealers, see 6 Corbin on Contracts § 1266 (1962).

³ The first act of this type was known as "The Automobile Dealers' Day-in-Court Act," 15 U.S.C. § 121 *et seq.* This Act gives a dealer a cause of action in federal court when an automobile manufacturer fails to act in good faith in terminating, cancelling or not renewing the dealer's franchise.

Whiteis' first dealership, opened in late 1962 or early 1963, was known as Tulsa Cycle Sports, 1701 Charles Page Boulevard. It was closed in 1971 when a major construction project closed the street. Whiteis owned the building and planned to reopen it when the street was finished. Some parts, counters and equipment were left in the building at the time of trial. Whiteis notified the Oklahoma Motor Vehicle Commission that he did not intend to renew his dealer's license in 1972, stating the franchise had been terminated in November, 1971.

Pappy's Cycle Center was opened by Whiteis in 1967 at 9204 East Avenue. It operated there for about one year. The 1969 franchise agreement designated the location as 30 South Union Street which was Whiteis' home. In 1971 Whiteis had taken a five-year lease on a building at 4804 East Eleventh Street intending to open it as Pappy's Cycle Center. He had set up the store and had motorcycles on display when Larry Murphy, Yamaha's district manager, paid him a visit. Murphy informed Whiteis that Yamaha would not allow him to sell motorcycles at that location and he had better get the cycles out of there. Whiteis had never held a dealer's license under the name "Pappy's."

Whiteis' largest dealership was Yamaha of Tulsa, opened in 1965 at 2623 East Eleventh. He lost this location in 1971 because his landlord elected to tear down the building and put up a shopping center. Having lost this lease, Whiteis leased a new premises at 6912 East Admiral. He prepared for business as he had with the new Pappy's Cycle Center, but encountered similar resistance from Yamaha. Whiteis signed and sent the usual specific site franchise agreement to Yamaha on October 21, 1971, but Yamaha refused to sign it. Five days later Yamaha cancelled all three franchises. In 1972 Whiteis transferred his dealer's license from Yamaha of Tulsa to his Motor Sports of Tulsa dealership. The franchise for Motor Sports was cancelled after this litigation commenced and is not directly involved in the damages sought here.

Yamaha argues that under these facts none of the disfranchised dealerships was an established business. It cites the rule disallowing recovery of profits when the injured business is not established and provides no basis for predicting future profitability. *E.g.*, *Plastic Products Corp. v. Filtrol Corp.*, 137 F. Supp. 401 (N.D. Okla. 1955); *Dieffenbach v. McIntyre*, 254 P.2d 346 (Okla. 1952). We cannot agree with Yamaha's characterization of the evidence. With the exception of the Pappy's dealership, Whiteis' businesses were established and profitable. They were closed only temporarily and Whiteis had the intention and the ability to reopen them.

The evidence supports a finding that Yamaha's conduct was responsible for the permanent demise of both Tulsa Cycle Sport and Yamaha of Tulsa. Both had a sufficient history of profitability to support an award of damages. We do not believe error can be predicated on the fact Pappy's was not a going concern. Whiteis had not operated a dealership under this name since 1967 and no profits from it would be reflected in Whiteis' income for the years relevant to determining his lost profits.

Yamaha also argues that because Whiteis kept only one set of books for all his dealerships, it is impossible to ascertain the loss of profits attributable specifically to the three cancelled franchises. This argument raises questions both as to the existence and as to the amount of damages. There is a distinction to be made between the two in the application of the "reasonable certainty" standard for proof of damages. *Ash v. Charles V. Noble Oil & Gas Co.*, 223 P. 175 (Okla. 1923); 22 Am. Jur. 2d *Damages* § 171 (1965); 5 Corbin on Contracts § 1020 (1964). In the *Ash* case the Oklahoma Supreme Court stated:

[T]he great weight of modern authority appears to hold that the rule that damages which are uncertain or contingent cannot be recovered . . . , does not apply to the uncertainty of the amount, but only as to

the uncertainty as to whether any damage or benefit has resulted in the breach of contract involved. (223 P. at 178).

The effect of the distinction has been stated in other cases:

It being apparent that some loss was suffered, it was entirely proper to let the jury determine what the loss probably was from the best evidence the nature of the case admitted.

Bishop-Babcock-Becker Co. v. Estes Drug Co., 163 P. 276, 278 (Okla. 1917); *accord*, *Southwest Ice & Dairy Products Co. v. Faulkenberry*, 220 P.2d 257 (Okla. 1950); *Johnson Oil Refining Co. v. Elledge*, 54 P.2d 543 (Okla. 1936).

We think it is apparent Whiteis suffered a loss of profits. He had been in business eight years and had no major debts. He had started with Yamaha when the motorcycle business, as we know it today, was still in its infancy and Yamaha was still relatively unknown in this country. With the exception of the years 1967 and 1968, he had consistently shown a profit. The decrease in profits concurred in time with the franchise cancellations and continued thereafter. In addition, there was expert testimony that the cancellations were the cause of Whiteis' loss of profits. We conclude it was entirely proper for the trial court to find the amount of damages based on the evidence of Whiteis' income in relevant years, even though his account methods did not segregate income from different franchise locations. We will not overturn the trial court's judgment as to the amount unless it is clearly erroneous.⁴

⁴ F.R. Civ. P. 52(a).

The evidence provided by two certified public accountants discloses the following income statistics in recent years.

Year	Whiteis' Accountant (cash basis)	Yamaha's Accountant (accrual basis)
1968	— \$ 7,455	— \$27,000
1969	+ \$ 8,470	+ \$44,929
1970	+ \$46,850	+ \$45,111
1971	— \$35,415	+ \$20,613
1972	+ \$14,900	— \$24,000

There also is evidence the trend continued into 1973 when Whiteis made little or no profit. A third certified public accountant testified these figures indicated a profitable business with consistently increasing gross sales and an average annual profit around 10 percent of gross sales. The witness concluded that these profits should have continued into the foreseeable future.

We cannot say the trial court's finding of \$100,000 as the amount of damages is clearly erroneous. Based on the accrual basis accounting of Yamaha's witness, Whiteis lost three-fourths of that amount in 1972 alone. Although we agree with Yamaha that part of the lost profits in 1971 may be attributed to temporary closings for other reasons, Yamaha's bad faith cancellations are the dominant causal factor in the subsequent years' losses. Had it not been for Yamaha's action, the franchise agreements could have continued in effect indefinitely.

A primary purpose of the principles applied to proof of amount damages is to avoid excessive verdicts based on sympathy rather than reasonable inferences. 22 Am. Jur. 2d *Damages* § 172 (1965); 5 Corbin on Contracts § 1022 (1964). The damages awarded by the trial court are based on reasonable inferences, even though they were not subject to computation with mathematical certainty.

We turn now to the issues raised by Whiteis on cross-appeal. We affirm the trial court's denial of punitive damages. The arguments in the briefs concern whether this case is within the general rule that punitive damages are not recoverable in breach of contract actions, *e.g.*, *Colby v. Daniels*, 257 P. 298 (Okla. 1927), or the rule allowing recovery of punitive damages when the breach of contract is tortuous in nature. *Hall Jones Oil Corp. v. Claro*, 459 P. 2d 858 (Okla. 1969). We do not rest our decision on either rule. The trial court did not hold, as a matter of law, that punitive damages could not be recovered. Rather, the court denied them because, under the evidence introduced at trial, it did not believe a punitive award "would serve any purpose." Punitive damages are not recoverable as a matter of right and whether or not they are recoverable is within the discretion of the court as the trier of the facts. 25 C.J.S. *Damages* § 117(2) (1966); 22 Am. Jur. 2d *Damages* § 240 (1965). We will not contravene the trial court's discretion and force it to award punitive damages.

The final issue for our consideration is whether the trial court erred in not awarding attorney's fees to Whiteis. The Oklahoma act regulating motor vehicle manufacturers and distributors contains a provision for awarding attorney's fees. The trial court held it applies only to proceedings before the Oklahoma Motor Vehicle Commission, and this position is supported by Yamaha on appeal. Whiteis argues the statute authorizes the awarding of attorney's fees in private damage actions.

The statute in question, Okla. Stat. Ann. tit. 47, § 565 (j)(4), provides that a manufacturer's or distributor's license may be revoked if it:

Has attempted to or has cancelled or failed to renew the franchise agreement of any motor vehicle dealer in this state unfairly and without just provocation or without due regard to the equities of the dealer or without good faith, as defined herein.

The next sentence states:

Upon such cancellation or failure to renew a franchise agreement, the party cancelling or failing to renew the franchise agreement shall compensate the dealer for the damages including attorney's fees as aforesaid, resulting from the cancellation or failure to renew the franchise agreement.

The confusion arises from the inclusion of a provision for a civil damage action in a statute pertaining primarily to grounds for suspension or revocation of licenses by the Oklahoma Motor Vehicle Commission. However, we think this is clearly what the Oklahoma legislature has done. In *Groom v. Kawasaki Motors Corp.*, 344 F. Supp. 1000 (W.D. Okla. 1972), section 565(j)(4) apparently was interpreted as creating both a proceeding for license revocation and a civil action for damages. This is the only reasonable construction of the statute.

As a rule of statutory construction, there is a presumption that every provision of a statute is intended to serve a purpose and should be given effect. *Hunt v. Washington Fire & Marine Ins. Co.*, 381 P. 2d 844 (Okla. 1963). The legislature is never presumed to have done a vain thing. *Moral Insurance Co. v. Cooksey*, 285 P. 2d 223 (Okla. 1955). Were we to agree with Yamaha's construction of the statute—that it applies only to proceedings before the Motor Vehicle Commission—the provision for damages and attorney's fees would be left without effect. The Motor Vehicle Commission does not entertain actions for damages.

In addition, section 565(j)(4) was amended to include the provision for damages and attorney's fees at the same time section 572, providing for venue in damage actions, was added to the act.⁵ Before these 1970 amendments, the act did not specifically authorize private damage actions

⁵ Ch. 197, [1970] Okla. Sess. Laws 326-34.

for franchise terminations which violated the terms of the act. This indicates the 1970 amendment to section 565(j)(4) was part of an overall plan to assure adequate compensation for dealers whose franchises are wrongfully terminated.

We conclude that the statute applies to this case. Its plain terms authorize compensation for the dealer's damages "including attorney's fees." The trial court's holding that it could not award attorney's fees was erroneous. We affirm the judgment in all other respects, but remand for a determination of reasonable fees for Whiteis' attorneys.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OKLAHOMA

No. 72-C-260

HAROLD G. WHITEIS, a sole proprietor, d/b/a MOTOR
SPORTS OF TULSA, *Plaintiff*,

v.

YAMAHA INTERNATIONAL CORPORATION,
a corporation, *Defendant*.

**Findings of Fact and Conclusions of Law of the United States
District Court for the Northern District Court of Oklahoma
Delivered Orally by Hon. Howard C. Bratton, U.S. District
Judge, on November 12, 1974, in the Above-Captioned Ac-
tion (Tr. 395-399):**

All right, I'm going to—I feel I'm in as good a position now, to decide your lawsuit as I'll ever be, and I'm going to decide the issue now, and I'll make my Findings of Fact and Conclusions of Law; they will be oral Findings of Fact and Conclusions of Law, but they constitute the Findings and Conclusions of the Court.

To make a long story short, I'm going to give Judgment for the plaintiff, and I'll tell you why. These are the Findings of Fact and Conclusions of Law of the Court:

The plaintiff and the defendant, through its authorized agents, made an oral agreement in the early 1960s, giving the plaintiff a dealer franchise for the County of Tulsa. That franchise was not refined much further than that, other than generally, you might say, he could have it so long as he serviced the area and did a good job in the area. I think that would be implied into any such agreement, under any circumstances.

The Statute of Frauds does not abrogate that contract; it could have been performed within the year and the Statute of Frauds does not apply. Anyway, the parties operated under their oral agreement for some period of time.

Without going into the occurrences in the mid 1960s, at which time the general outline of the oral agreement between the parties was reaffirmed at the Dallas meeting, why, the parties then, in 1969, signed six separate dealer franchise agreements and I will just say, I—it makes no difference to the outcome of the lawsuit or the conclusion of the Court—Findings or Conclusion of the Court as to whether you interpret those agreements as abrogating the original oral franchise; area franchise or the Tulsa County, certainly, in the execution of those agreements, Mr. Whiteis did not feel or believe that they abrogated the original agreement of the parties.

The defendant corporation has a feeling or belief, and I don't know which way, whether it would or would not have a feeling or belief, I will just say, the agreements speak for themselves. They apply to specific locations, and construing those agreements against the corporation which drafted them, you would come to the conclusion that they apply only to those locations, and do not abrogate the original entire agreement of the parties for the County of Tulsa, but if—whether they do or do not makes no difference to the outcome of the lawsuit.

Under any circumstances, in 1971, the mysterious letter appeared in the—in California with a number of signatures on it, complaining about Mr. Whiteis. That letter was referred by Mr. Tiernan to Mr. Corona to investigate that letter. We do not have the benefit of Mr. Corona's testimony, but I find that the facts are as outlined by Mr. Murphy.

When Mr. Corona called Mr. Murphy and directed him to get rid of Mr. Whiteis, he directed that his franchise be terminated for any reason; that he prepare reasons or assemble some reasons which could be used to get rid of Mr. Whiteis, whether those are or not, and they were not the genuine reasons.

Following those instructions, Mr. Murphy assembled a number of reasons and kept writing them to the company, and ultimately wrote to the company forms requesting the cancellation of the written agreements of 1969. The reasons outlined on those forms are not indeed, the true and correct reasons for seeking the cancellation. The true and correct reasons were that Mr. Murphy was following Mr. Corona's direction to do so.

Those reasons were such, that were it not for the direction of Mr. Corona, there would have been no franchise cancellations, they were matters that had been or would be overlooked in other dealers and would have been in Mr. Whiteis, if it were not for the directions of Mr. Murphy to get rid of Mr. Whiteis.

Accordingly, the letters of cancellation were sent as to the various locations, and Mr. Whiteis was directed to not sell at other locations, the 6912 East Admiral Place and the 4804 East 11th, he was not permitted to sell Yamaha vehicles there, and the reasons of no dealer's license and other matters pertaining to those locations just are not the true and the real reasons that the company would not permit operations there, and would not permit operations under the original franchises which were at different locations—moved from different locations. The real reason, as I say, was the letter of complaint which was not investigated by the company; it was not authenticated, and there is no evidence, whatsoever, that it was a genuine, authentic letter of complaint.

The company, at a minimum, was extremely negligent and derelict in accepting such a letter at its face value.

Now, with that, I find that under the obligations of fair dealing owed to the parties under their contracts and under the Statutes of Oklahoma, which the parties agree are applicable to the dealings of the parties, I find that the company did not act in the good faith and required of parties dealing with each other under contract or under the Oklahoma Statute.

Therefore, Mr. Whiteis is entitled to recover the damages he has sustained. As in any case, damages are difficult to ascertain and determine with any precision; mathematical precision, I should say, and that is true in this case. However, I believe and I find that damages will be in the amount of one hundred thousand (\$100,000.00) dollars will be awarded to the plaintiff in this case.

Compensation for the profits he lost as a result of the wrongful termination of the agreement between the parties by the defendant, termination without good or just cause. I find that that is primarily the profits or lost profits Mr. Whiteis would have suffered, and the other incidental losses to him under the termination.

I do not—in the circumstances, I am not satisfied that the wrongdoing in this case—wrongful action on the part of the corporation reached to the National Director, the Chief Officer, I guess not, Mr. Tiernan. I do not feel that punitive damages would serve the purpose for which they are—would serve any purpose. I'm not—punitive damages are not justified for the purpose for which they are designed or intended.

I do not read the Oklahoma Statute as you do, Mr. Cohen, to authorize attorneys fees in this type of action, proceeding before the Commissioner, yes, but not in this type of action. Accordingly, I will not award attorneys fees in the case.

. . . .